No. 07-2070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY J. EXUM

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JULIE B. BROIDO
Supervisory Attorney

GREGORY LAURO
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2965

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

TABLE OF CONTENTS

Headings **Page(s)**

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases--Cont'd **Page(s)**

Cases--Cont'd **Page(s)**

Statutes

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

National Labor Relations Board Rules and Regulations

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-2070

BILLY J. EXUM

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Billy J. Exum ("Exum") to review a Decision and Order of the National Labor Relations Board ("the Board") dismissing an unfair labor practice complaint filed by the Board's General Counsel against Fineberg Packing Company, Inc. ("the Company"). The Board's Decision and Order, which is final with respect to all parties, issued on January 31, 2007,

and is reported at 349 NLRB No. 29. (D&O 1-15, A 24-38.)[1] The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). Exum, the Charging Party before the Board, filed his petition for review on September 4, 2007; the petition is timely because the Act places no time limit on filing actions to review Board orders.

As shown below, however, the Court lacks jurisdiction over the claims raised in Exum's petition because he failed to present them to the Board before seeking judicial review. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)) ("no objection that has not been urged before the Board . . . shall be considered by the Court").

ORAL ARGUMENT STATEMENT

The Board believes that the Court lacks jurisdiction to consider the merits of Exum's claims. Assuming that the Court has jurisdiction, the Board believes that this case involves the application of well-settled principles to essentially undisputed facts, and that argument therefore would not be of material assistance to the Court. If the Court decides that argument is necessary, however, the Board

---

[1] "D&O" refers to the Board's Decision and Order; "Tr" refers to the transcript of the hearing below; "GCX" refers to the exhibits introduced at the hearing by the Board's General Counsel, and "JX" refers to the joint exhibits introduced at the hearing by the parties. "A" refers to the parties' joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

believes that 10 minutes per side will be sufficient for the parties to present their views and requests that it be permitted to participate.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Court is jurisdictionally barred from considering the claims raised in Exum's petition because he failed to present them to the Board before seeking judicial review.

2. Assuming *arguendo* that the Court has jurisdiction, whether the Board reasonably dismissed the complaint allegation that the Company unlawfully discharged Exum and 31 other employees who had engaged in an unprotected work stoppage.

STATEMENT OF THE CASE

After investigating an unfair labor practice charge filed by employee Exum, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Exum and 31 other employees who had engaged in a work stoppage. (D&O 8, A 31; GCX 1(c), A 50.) Following a hearing, the administrative law judge found that the Company had violated the Act as alleged. (D&O 8-15, A 31-38.) Specifically, the judge found that the work stoppage was protected despite the no-strike clause in the parties' collective-bargaining agreement and that, in any event, the Company had condoned the stoppage. The Company filed exceptions to the judge's

decision. Neither Charging Party Exum nor the Board's General Counsel replied to the Company's exceptions.

On January 31, 2007, the Board reversed the judge and dismissed the complaint. (D&O 1-5, A 24-28.) The Board found that the General Counsel had conceded in its pleadings that the employees' work stoppage was unprotected because it violated the parties' no-strike clause. (D&O 3, A 26.) The Board also found that the General Counsel had not established by "clear and convincing" evidence that the Company had condoned the unprotected work stoppage. (D&O 3-5, A 26-28.) Accordingly, the Board reversed the judge's proposed conclusion that the Company violated the Act by discharging Exum and the other 31 employees, and dismissed the complaint. Neither Exum nor the General Counsel filed a motion for reconsideration of the Board's decision.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Board based its findings on the facts summarized below, which are essentially undisputed.

A. Background; the Parties' Agreement Contains a No-Strike Clause Barring Employee Strikes or Slowdowns

The Company processes meat products at its facility in Memphis, Tennessee. For more than 40 years, the Union has represented a unit of the Company's approximately 60 production and maintenance employees. (D&O 1, A

24; Tr 362, 374, A 374, 386 (Freudenberg).) The parties' most recent collective-bargaining agreement ("the Agreement") contained a valid no-strike clause, which provided that "there shall be no strikes, lockouts, slow-downs, or legal proceedings without first using all possible means of settlement as provided in this Agreement of any controversy which might arise." (D&O 1-2 & n.12, A 24-25 & n.12; JX 1, Article 16, A 64.) The Agreement also contained a provision that guaranteed the employees a 35-hour work week. (D&O 1, A 24; JX 1, Article 10, A 60.)

B. The Employees Walk Out—in Violation of the No-Strike Clause—after the Union and the Company Agree To Temporarily Suspend the Guaranteed 35-hour Work Week

In January 2001, the Company encountered financial difficulties. Plant Manager Richard Freudenberg told Union President John Canada that—to avoid a layoff—the Company needed a temporary, three-month suspension of the guaranteed 35-hour work week. Canada agreed to the proposed three-month suspension, to commence on February 15, 2001. (D&O 1, A 24; Tr 40, 370-73, A 82, 382-85 (Freudenberg).)

On February 12, a few days before the planned suspension of the 35-hour work week was to take effect, employee Billy Exum began discussing the planned suspension with his coworkers. (D&O 1, A 24; Tr 55-56, A 97-98 (B. Exum).) Early on the morning of February 14, Exum and the majority of unit employees decided to stop working, leave their work stations, and wait outside the facility so

that they could discuss the suspension with Plant Manager Freudenberg when he arrived for work. (D&O 1, A 24; Tr 59-60, 84, A 101-02, 126 (B. Exum).)

C. In Response to the Work Stoppage, the Company Orders the Employees To Return to Work or Leave the Premises; When Employees Ask if They Were Fired, the Company Replies that It Had Not Fired Anyone and They Should Come Back Tomorrow; the Company also Tells Exum He Might Need a Pen to Apply for Another Job

When Freudenberg arrived, Exum and employee Kathy Furlong told Freudenberg that the employees wanted to discuss the reduction in their work hours. Freudenberg ordered the employees to return to work or leave the premises. (D&O 1-2, A 24-25; Tr 61-63, 67, 88-89, A 102-04, 109, 130-31 (B. Exum).) When several employees asked whether they were fired, Freudenberg replied, "I am not firing anybody." He also told the employees to "come back the next day." (D&O 1-2, A 24-25; Tr 68, 88-89, A 110, 130-31 (B. Exum), 111-13, A 153-55 (B. Alston), 131, A 173 (Brooks).)

At that point, the employees dispersed. Many returned to work. Thiry-two others, including Exum, went to the locker rooms to prepare to leave. (D&O 2, A 25; Tr 67-69, A 109-11 (B. Exum).) Freudenberg entered the men's locker room and told the employees there that they should leave. Exum asked if they were fired and Freudenberg replied, "No . . . come back tomorrow." (D&O 1-2, A 24-25; Tr 88, A 130 (B. Exum).) Exum dropped a pen as he left and Freudenberg told Exum to pick up the pen because Exum might need it "to fill out an application for

another job." (D&O 2 & n.7, A 25 & n.7; Tr 88-89, A 130-31 (B. Exum).) Freudenberg also went to the women's locker room, where employee Katie Brooks asked whether the employees were fired. Freudenberg repeated that they were not fired and that they should "come back tomorrow." (D&O 2, A 25; Tr 131, A 173 (Brooks).)

D. The Company Discharges the 32 Employees Who Continued the Unprotected Strike Rather than Return to Work

That same morning, the 32 employees who had retreated to the locker rooms (rather than return to work) left the premises and waited outside the plant gate for the arrival of their union representative. (D&O 2, A 25; Tr 69, A 111 (B. Exum).) Union President Canada arrived around noon that day and asked Freudenberg to allow the employees to return to work. Freudenberg refused. Canada told the 32 employees that the Company would not permit them to return and that the Union would hold a meeting with the employees the next day. (D&O 2, A 25; Tr 531-33, 546, A 495-97, 510 (Canada).)

The next morning, February 15, some of the 32 employees returned to the company premises. However, the Company did not permit them to enter. (D&O 2, A 25.) On February 16, the 32 employees returned to pick up their final

paychecks. (D&O 2-3, A 25-26.) At that time, Freudenberg also gave them separation notices stating that they had "voluntarily quit." (*Id.*)[2]

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Schaumber; Member Liebman dissenting in part) reversed the administrative law judge and dismissed the complaint, which had alleged that the Company had unlawfully discharged the 32 striking employees. (D&O 1, 3-5, A 24, 26-28.) The Board found that the General Counsel had conceded that the employees' work stoppage was unprotected (D&O 3, A 26), and had failed to prove by "clear and convincing" evidence that the Company had condoned the unprotected stoppage (D&O 3-5, A 26-28).

SUMMARY OF ARGUMENT

I. The Court should deny Exum's petition for review for lack of jurisdiction. Section 10(e) of the Act (29 U.S.C. § 160(e)) expressly bars the Court from considering any claim that has not been urged before the Board. Yet, on appeal here, Exum argues for the first time that the Board erred in dismissing the complaint against the Company. Indeed, Exum repeatedly declined to present any claim to the Board. When the Company argued to the Board that the judge erred in

[2] The Company did not discharge the other employees, who had returned to work as ordered. (D&O 4, A 27.)

finding merit to the complaint, Exum chose not to respond. When the Board subsequently reversed the judge and ruled in the Company's favor, Exum declined to file a motion for reconsideration with the Board. Accordingly, pursuant to well-settled precedent, the Court lacks jurisdiction to consider Exum's claim, articulated for the first time in his appellate brief after forgoing the opportunity to file a motion for reconsideration with the Board.

II. Assuming the Court has jurisdiction, it should deny Exum's petition for lack of merit. Contrary to Exum's sole claim, the Board reasonably found that the Company had not clearly condoned the employees' unprotected work stoppage. Indeed, Exum recognizes the legal principles and facts that support the Board's conclusion. He concedes that condonation can only be proven by "clear and convincing" evidence, and may not be "lightly presumed" from ambiguous statements. He alleges only that condonation is proven here by the Company's statements to employees that they were not fired and should come back tomorrow. Yet, he acknowledges that when the Company made those statements, it also told him that he might need to apply for another job. Given this ambiguity and the settled principle that condonation may not be lightly presumed, the Board reasonably declined to infer a definitive intent to forgive from the Company's equivocal statements.

Exum offers nothing that compels the opposite conclusion. He relies heavily on the employees' subjective interpretations of the Company's statements. Those subjective interpretations are irrelevant, however. And, if they were relevant, they would not support Exum's claim because many employees testified that they were unsure whether the Company had forgiven their unprotected strike.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO CONSIDER EXUM'S BELATED CHALLENGE TO THE BOARD'S DECISION TO DISMISS THE COMPLAINT

Before the Court, Exum (Br 13-23) argues for the first time that the Board erred in dismissing the unfair labor practice complaint against the Company because the Company allegedly condoned the employees' unprotected work stoppage. As we now show, however, the Court is jurisdictionally barred from considering Exum's untimely claim.

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in relevant part that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here. That statutory provision creates a jurisdictional bar against judicial review of issues not raised before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). This Court enforces that bar strictly, holding consistently that a litigant's failure to present a question to the Board in the first instance precludes

this Court from considering it on appeal. *See Southern Moldings, Inc. v. NLRB*, 728 F.2d 805, 806 (6th Cir. 1984) (en banc); *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 690 & n.1 (6th Cir. 2006). As this Court has noted, Section 10(e)'s jurisdictional bar "affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that [the court] may have the benefit of its opinion when [the court] reviews its determinations." *NLRB v. Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977). Moreover, adherence to the jurisdictional command of Section 10(e) results in a "win-win situation" because it "simultaneously enhances the efficiency of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship." *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459 (1st Cir. 2005).

Here, Exum never presented *any* argument to the Board, despite having ample opportunity to do so. After the administrative law judge issued a recommended order finding merit to the unfair labor practice complaint, the Company filed exceptions with the Board, arguing that the judge had erred in finding that the Company had condoned the employees' unprotected strike. Neither Exum nor the General Counsel, however, replied to the Company's exceptions. *See* NLRB Rules and Regulations, 29 CFR § 102.46(a)-(d) (providing that any party may file a brief in support of the judge's decision, or oppose another party' exceptions to the judge's decision). Thereafter, the Board reversed the

judge and dismissed the complaint, finding that the Company had not condoned the work stoppage. Yet, neither Exum nor the General Counsel filed with the Board any motion for reconsideration. *See* NLRB Rules and Regulations, 29 CFR § 102.48(d)(2) (motions for reconsideration "shall be filed within 28 days" of the Board's decision). In sum, Exum repeatedly declined to exercise his right to present his argument to the Board.

Accordingly, under well-established precedent, this Court lacks jurisdiction to consider Exum's untimely challenge to the Board's dismissal of the complaint, articulated for the first time in his appellate brief after forgoing the opportunity to file a motion for reconsideration with the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (holding that, in the absence of a motion for reconsideration, Section 10(e) bars a court from considering arguments which the party has raised for the first time on appeal); *accord W&M Properties of Connecticut, Inc. v. NLRB*, 541 F.3d 1341, 1345-46 (D.C. Cir. 2008); *UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007); *Southern Moldings, Inc.*, 728 F.2d at 806; *Temp-Masters, Inc.*, 460 F.3d at 690 & n.1.[3]

[3] Moreover, no "special circumstances" justify Exum's failure to present his argument to the Board here, where he had the opportunity to do so by replying to the Company's exceptions, or filing a motion for reconsideration with the Board. *See St. Francis Fed'n of Nurses and Health Prof'ls v. NLRB*, 729 F.2d 844, 858-59 (D.C. Cir. 1984) (union barred from raising claim for first time on appeal where it had forgone opportunity to file motion for reconsideration in favor of filing a petition for review); *accord W&M Properties*, 541 F.3d at 1346.

Exum's failure to present his arguments to the Board is not excused merely because he initially prevailed when the administrative law judge recommended finding merit to the complaint. Rather, once the Board reversed the judge and ruled in the Company's favor, Exum, in order to preserve his judicial appeal, was required to at least file a motion for reconsideration informing the Board of his argument. *See, e.g.*, *Des Moines Mailers Union, Teamsters Local No. 358*, 381 F.3d 767, 770 n.1 (8th Cir. 2004) (holding that "a party who prevails before an administrative law judge must at least present objections to the Board in a motion for reconsideration").

Likewise, it does not matter that the Board decided the condonation issue, or that the Company (as opposed to Exum) presented its own position on that issue to the Board. Rather, "[t]he Supreme Court has made clear that a petitioner must seek Board reconsideration or rehearing before it brings an issue to the courts, *even when the Board has discussed and decided the contested issue*." *UFCW Local 204*, 506 F.3d at 1087 (emphasis added) (citing *Woelke & Romero*, 456 U.S. at 665-66); *accord W&M Properties*, 541 F.3d at 1345. Thus, Exum was required to inform the Board of his *own* arguments, which would likely differ from those presented by the Company, its opponent before the Board. *See UFCW Local 204*, 506 F.3d at 1087 ("Because the union gave the Board no opportunity to rule on the particular issue it presents here, section 10(e) bars [the Court] from considering" that claim).

Indeed, the arguments that Exum raises for the first time in his appellate brief here are exactly the kind of arguments that should be subject to Section 10(e)'s jurisdictional bar. For example, Exum now claims (Br 21) for first time that the Board "minimized" or "over-looked" certain "crucial" facts, and thereby "failed to address" how those facts would "affect[] its analysis" of the condonation issue. Exum, however, failed to inform the Board which facts, exactly, were allegedly crucial or overlooked. In sum, because Exum "gave the Board no opportunity to rule on the particular issue [he] presents here, section 10(e) bars [the Court] from considering" his claim. *UFCW Local 204*, 506 F.3d at 1087; *accord Allied Products Corp.*, 548 F.2d at 653 (explaining that Section 10(e) requires a party to afford the Board a chance to address its claims before it may resort to judicial appeal).

II. IN ANY EVENT, THE BOARD PROPERLY DISMISSED THE COMPLAINT BASED ON ITS REASONABLE FINDING THAT THE COMPANY HAD NOT CONDONED THE EMPLOYEES' UNPROTECTED WORK STOPPAGE

Assuming the Court has jurisdiction to address Exum's claim, it should deny his petition for review for lack of merit. Initially, it should be noted that the issue before the Court is a narrow one. Exum neither challenges the Board's finding that the employees engaged in an unprotected work stoppage, nor disputes that the

Company could lawfully discharge employees for that misconduct. He has therefore waived those claims.[4]

Instead, Exum's sole claim (Br 13-23) is that the Company condoned the employees' unprotected work stoppage, and therefore could not lawfully discharge them for their misconduct. Exum concedes (Br 16) that the Board "correctly stated the law surrounding condonation." He only asks the Court to draw different inferences from the undisputed testimony. As we now show, however, Exum's claim fails because the Board reasonably found that the testimony did not amount to "clear and convincing" proof of condonation.

A. Applicable Principles and Standard of Review

In this case, the General Counsel bore a particularly heavy burden in attempting to prove that the Company condoned the employees' unprotected work stoppage. As Exum concedes (Br 16), the General Counsel can establish condonation only with "*clear and convincing* evidence that the employer has agreed to forgive the misconduct, to wipe the slate clean, and to resume or continue the employment relationship as though no misconduct occurred." *United*

---

[4] *See, e.g.*, *Hyatt Corp. v. NLRB*, 939 F.2d 361, 368 (6th Cir. 1991) (party's failure to address Board's findings constitutes abandonment of the right to object); *accord NLRB v. Talsol Corp.*, 155 F.3d 785, 793-94 (6th Cir. 1998). *See also Dunkin' Donuts Mid-Atlantic Dist. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (Fed R. App. Proc. 28(a)(9) requires that the argument portion of a party's opening brief contain the parties' contentions and the reasons for them, with citations to the authorities and portions of the record on which the party relies).

Parcel Service, Inc., 301 NLRB 1142, 1143 (1991) (emphasis added); *accord NLRB v. Colonial Press, Inc.*, 509 F.2d 850, 854 (8th Cir. 1975); *Plasti-Line, Inc. v. NLRB*, 278 F.2d 482, 487 (6th Cir. 1960). As this Court has explained, "condonation may not be lightly presumed from mere silence or equivocal statements." *Plasti-Line, Inc.*, 278 F.2d at 487; *accord NLRB v. Tanner Motor Livery, LTD*, 419 F.2d 216, 222 (9th Cir. 1969).

The courts have applied this standard strictly, consistently refusing to infer condonation from uncertain evidence. *See, e.g., Colonial Press, Inc.*, 509 F.2d at 854-56; *S.W. Noggle Co. v. NLRB*, 478 F.2d 1144, 1146 (8th Cir. 1973); *Packers Hide Assoc., Inc. v. NLRB*, 360 F.2d 59, 62 (8th Cir. 1966). For instance, the courts have held that statements to the effect that guilty employees may return to work do not necessarily prove condonation. *See, e.g., Plasti-Line*, 278 F.2d at 486-87 (employer did not condone unprotected strike by requesting strikers to return to work); *Packers Hide*, 360 F.2d at 62 (same); *Woodlawn Hosp. v. NLRB*, 596 F.2d 1330, 1341 (7th Cir. 1979) ("[A]n offer of reinstatement is not condonation unless accompanied by a clear expression of forgiveness").

Likewise, an employer's initial assurance when faced with striker misconduct, that strikers were "not fired" and "wanted back," may be "primarily made to keep the peace" and falls short of a clear willingness "to wipe the slate clean." *NLRB v. Community Motor Bus Co.*, 439 F.2d 965, 967-68 (4th Cir. 1971).

In sum, the courts have routinely refused to infer condonation from statements that may indicate an employer's desire to negotiate or deliberate before deciding whether to take disciplinary action. *Colonial Press, Inc.*, 509 F.2d at 855-56; *Community Motor Bus*, 439 F.2d at 967-68; *accord Fiberboard Corp.*, 283 NLRB 1093, 1097-98 (1987).

On appeal, the findings of fact underlying the Board's decision are "conclusive" if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Substantial evidence is that which a reasonable person might accept as supporting the finding under review. *Universal Camera Corp.*, 340 U.S. at 477. Accordingly, this Court is "not free to substitute [its] judgment for that of the Board simply because [it] would have made a different decision had [it] heard the case *de novo.*" *NLRB v. Local 1131*, 777 F.2d 1131, 1136 (6th Cir. 1985). In addition, the Board's determination as to which testimony carries the most weight is entitled to particular deference, and must be upheld unless it is "clearly in error." *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 286 n.1 (6th Cir. 1998). Moreover, where, as here, the Board finds that its General Counsel failed to prove any violation of the Act and therefore dismisses the unfair labor practice complaint, that finding must be upheld "unless it has no rational basis in the record." *Laborers' Local Union No. 204 v. NLRB*, 904 F.2d 715, 717

(D.C. Cir 1990); *accord United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992).

Based on the foregoing, Exum faces an uphill battle in asking this Court to reverse the Board's finding that the General Counsel failed to establish by "clear and convincing" evidence that the Company condoned the unprotected work stoppage. He cannot succeed merely by showing that the record evidence *could be* viewed as proving condonation; rather, he must show that his view is the *only* reasonable view of the facts. Moreover, Exum's hurdle is even higher given the unusually high evidentiary standard for establishing condonation. Thus, Exum, in order to prevail on appeal, must show that the record here can only be reasonably viewed as "clear and convincing" proof of condonation. As we now explain, Exum fails in that endeavor because the Board reasonably found no such proof here.

B. The Board Reasonably Found that the General Counsel Failed To Establish by "Clear and Convincing" Evidence that the Company Condoned the Employees' Unprotected Work Stoppage

Exum's challenge to the Board's findings is very narrow. His sole claim (Br 13-23) is that Plant Manager Freudenberg condoned the unprotected stoppage when he responded to employee questions on the day of the strike by telling them, at that time, that they were not fired and should "come back tomorrow." (Tr 88-89, A 130-31 (Exum).) Exum does not assert that any other company statement or

act proved condonation. He is thus barred from making any such claim now. *See cases cited at n.4 above* (claims not made in opening brief are waived). Thus, this Court should deny Exum's petition for review so long as the Board reasonably found that Freudenberg's statements were not "clear and convincing" proof that the Company intended to forgive the employees "as if their misconduct had not occurred." *Plasti-Line, Inc. v. NLRB,* 278 F.2d 482, 487 (6th Cir. 1960). As we now show, the Board's finding is reasonable and should be affirmed.

The Board carefully addressed (D&O 3-5, A 26-28) Freudenberg's statements that employees were not fired and should come back tomorrow, and reasonably concluded that they were too "ambiguous" to constitute clear and convincing proof of condonation.[5] As the Board noted (D&O 4, A 27), Freudenberg never specifically assured the employees that their actions had been completely forgiven or that no further consequences would ensue if they continued the work stoppage. Nor did he specify what would happen if the employees left work before the end of their shifts and returned tomorrow. Rather, when

[5] The Board also reasonably interpreted (D&O 4, A 27) Freudenberg's prior order—that striking employees must return to work or leave the premises—as providing the choice to either immediately return to work with no reprisals, or leave and "assume the risk of possible future disciplinary action." Accordingly, the Board found (*id.*) that while this statement arguably forgave the employees who immediately returned to work, it did not forgive those who subsequently continued the stoppage. This finding is not before the Court because Exum did not address it in his brief. *See cases cited at n.4 above* (claims not raised in opening brief are waived).

Freudenberg told Exum and others that they were not fired and should "come back tomorrow," Freudenberg also warned Exum to keep a pen he had dropped because he might need it to "fill out an application for another job." (D&O 2 & n.7, A 25 & n.7; Tr 88-89, A 130-31 (B. Exum).)

Given this ambiguity, the Board reasonably declined (D&O 4, A 27) to infer a "definitive intent to forgive" from Freudenberg's remarks. In exercising such restraint, the Board followed this Court's directive that condonation "may not be lightly presumed." *Plasti-Line*, 278 F.2d at 487. As the Board explained (D&O 4-5, A 27-28), Freudenberg's remarks can be reasonably read as indicating, at best, that the Company had not yet decided whether to discharge the strikers. That is not equivalent, however, to a promise "to retain the employees who continued the strike." (D&O 5, A 28.) Nor was it a guarantee as to what "tomorrow" might bring. (*Id.*) *See NLRB v. Community Motor Bus Co.*, 439 F.2d 965, 967-68 (4th Cir. 1971) (employer's initial assurance that strikers were "not fired" and "wanted back" fell short of explicit condonation); *NLRB v. Colonial Press, Inc.*, 509 F.2d 850, 855-56 (8th Cir. 1975) (request that guilty employees "come in and talk" was only "preliminary invitations to negotiate"); *cf. Plasti-Line, Inc.*, 278 F.2d at 486-87 (request that strikers return to work did not condone unprotected strike). In sum, the Board reasonably found (D&O 3-5, A 26-28) that Freudenberg's remarks

were too ambiguous to constitute a "clear showing" that the Company agreed to "wipe the slate clean." *Community Motor Bus,* 439 F.2d at 967-68.

1. Exum's claims are without merit

As just shown, the Board reasonably found that Freudenberg's statements were too ambiguous to constitute "clear and convincing" proof of condonation. As we now show, Exum points to nothing that would compel the opposite conclusion.

Rather, Exum's characterization of Freudenberg's statements confirms the reasonableness of the Board's finding. As noted, Exum's central claim (Br 19-21) is that he "received confirmation of Freudenberg's condonation" when Freudenberg stated that no one was being fired and that Exum should come back the next day. Exum concedes (Br 19), however, that Freudenberg said in the same conversation that Exum might need "to fill out an application for another job." Thus, Exum's description of the conversation supports the Board's finding that Freudenberg's statements were too ambiguous to guarantee that employees who continued the strike would not be subject to future discipline. Indeed, even Exum acknowledges (Br 21) the "inherent inconsistency" in simultaneously suggesting that he was not fired, but might need to find another job.

Nor can Exum persuasively claim (Br 21-22) that Freudenberg resolved any ambiguity by repeating that Exum was "not fired" after telling him that he might have to apply for another job. To the contrary, the cited testimony does not clearly

show whether Freudenberg repeated this assurance after warning Exum that he might need to find another job.[6] And, even if Freudenberg had repeated that assurance, the ambiguity would remain in his simultaneously telling Exum that he was not fired but might have to find another job.

Exum's other arguments rely on the erroneous assumption that the Board must find condonation so long as the employees subjectively believed that they had been forgiven. Thus, Exum opines (Br 19) that it would be "unreasonable" to "simply walk off the job" if he believed that might result in his discharge. He also notes (*id.*) that employee Robert Alston apparently believed that "come back tomorrow" meant that he would not be discharged for walking out. Exum, however, provides no support for his apparent view that the Board is bound by the employees' beliefs. To the contrary, the Board noted (D&O 4 n.15, A 27 n.15) that "the employees' subjective understanding of Freudenberg's remarks is irrelevant to a condonation analysis; the critical inquiry is whether [the Company's] actions evinced an intent to wipe the slate clean." In any event, even if the employees' subjective beliefs were relevant, which they are not, their testimony here does not help Exum. Many employees, including Exum, testified

---

[6] *See* Tr 88, A 130 (Exum) (failing to specify whether Freudenberg repeated that Exum was not fired *after* telling Exum he might need to apply for another job); Tr 247-48, A 267-68 (Macklin) (failing to even mention the statement that Exum might need to apply for another job).

that, even after Freudenberg's alleged assurances, they were unsure whether they would have a job if they continued the work stoppage, that they simply did not know what "come back tomorrow" meant, or that they expected to "come back" to negotiate over unresolved issues resulting from their work stoppage.[7]

Nor is there any basis to Exum's claim (Br 21-23) that the Board "minimized" the testimony of employees who claimed that Freudenberg told them to "return to work" the next day. To the contrary, the Board reasonably found (D&O 4 & n.15, A 27 & n.15) that while some *employees* might have *inferred* from Freudenberg's remarks that they were to "return to work," Freudenberg in fact told them to "come back tomorrow." The Board's conclusion is well supported by the employees' testimony.[8] In any event, as the Board noted (D&O 4

---

[7] *See, e.g.,* Tr 103-04, A 145-46 (B. Exum admitted that after hearing Freudenberg's statements he was unsure whether he would be terminated); Tr 494-95, A 491-92 (employee Lindsey testified that she understood that any employee who continued to walk out would not have a job); Tr 247-48, A 267-68 (employee Macklin testified that he did not know what "come back tomorrow" meant); Tr 113, A 155 (B. Alston), 347-48, A 365-66 (Furlong) (both employees testified that they expected to return the next day to negotiate with Freudenberg over issues resulting from the work stoppage).

[8] *See, e.g.,* Tr 68, 88-89, A 110, 130-31 (B. Exum) (asserting that Freudenberg told him to "come back tomorrow"), Tr 131, A 173 (Brooks) (testifying that she heard "come back tomorrow," which she thought meant "come back to work"); 204-05, 214, 225-26, A 237-38, 247, 258-59 (R. Alston) (same). *See also* Tr 273, A 291 (J. Exum) (testifying she heard both "come back to work tomorrow" and "come back tomorrow," which she "assume[d]" meant come back "to work"); Tr 334, 336, A 352, 354 (Furlong) (first testifying she heard "be back in the morning," then that she heard "be back to work" in the morning).

n.15, A 27 n.15), even if Freudenberg had told the employees to "return to work tomorrow," that would not prove condonation. *See cases cited above at p.16* (holding that an employer's statement that guilty employees should return to work does not necessarily prove condonation).

Finally, Exum fails to support his claim (Br 17) that it "runs contrary to the law" for the Board to find that Freudenberg's statements were too ambiguous to prove condonation. Exum concedes (Br 16) that the Board "correctly stated the law surrounding condonation." He also fails to identify a single case that would require the Board to infer condonation from the statements presented here.[9] To the contrary, as shown above, the undisputed testimony and settled precedent support the Board's reasonable finding that Freudenberg's statements were too ambiguous to amount to "clear and convincing" proof of condonation.

In sum, the Court should deny Exum's petition for review, in which he claims for the first time that the Board erred in dismissing the complaint. The Court is jurisdictionally barred from considering Exum's claim because he failed to present it to the Board in the first instance. Moreover, assuming that the Court has jurisdiction, it should deny the petition for lack of merit. Exum's sole claim—that the Company condoned the employees' unprotected work stoppage—fails because

---

[9] Exum is therefore barred from making any such claim now. *See cases cited at n.4 above* (a party's opening brief must contain its claims and identify which authorities support those claims).

the Board reasonably found that there was no clear and convincing proof of condonation.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Exum's petition for review.

JULIE B. BROIDO
Supervisory Attorney

GREGORY P. LAURO
Attorney

National Labor Relations Board
1099 14th Street, N.W.
(202) 273-2996
(202) 273-2971

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

April 2008

h:\acbcom\Exum final brief jbgl

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY J. EXUM	)	
	)	
Petitioner	)	No. 07-2070
	)	
v.	)	Board Case No.
	)	26-CA-20287
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5880 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of April 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY J. EXUM	)	
	)	
Petitioner	)	No. 07-2070
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent	)	26-CA-20287
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

William B. Ryan
Bryce W. Ashby
Donati Law Firm, LLP
1545 Union Avenue
Memphis, TN 38104

_____

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 10th day of April, 2008